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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUBPOENA IN

PowerDsine, Inc. and PowerDsine, Ltd. v.
AMI Semiconductor, Inc. and AMI
Semiconductor Belgium BVBA,

U.S. District Court, Southern District of
New York, Case No. 07-CV-6014 (SAS)
(FM)

Misc. No. _____

PETITIONER THIRD PARTIES
BROADCOM CORPORATION AND
SHIMON ELKAYAM'S NOTICE OF
MOTION AND MOTION TO QUASH OR
FOR A PROTECTIVE ORDER
REGARDING DEPOSITION AND
DOCUMENT SUBPOENA TO SHIMON
ELKAYAM; MEMORANDUM OF POINTS
AND AUTHORITIES

Date: September 22, 2008
Time: TBD
Place: TBD
Judge: TBD

TO EACH PARTY AND ITS ATTORNEYS OF RECORD:

FILED

AUG 11 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-FILING

ADR

JW

PVT

CV 08-80154 MISC.

1 **PLEASE TAKE NOTICE** that, pursuant to Rules 45(c)(3)(A), 45(c)(3)(B) and 26(c) of
2 the Federal Rules of Civil Procedure, Petitioners Broadcom Corporation ("Broadcom") and
3 Shimon Elkayam ("Elkayam"), by their undersigned counsel, will and hereby do move for an
4 order quashing, or for a Protective Order regarding, a deposition and document subpoena to
5 Elkayam transmitted via e-mail by counsel for PowerDsine, Inc. and PowerDsine Ltd during the
6 evening of Thursday, August 7, 2008 and noticed for 9:00 a.m. Tuesday, August 12, 2008.
7 Petitioners further move for an immediate order staying the deposition pending the outcome of
8 this motion.

9 Petitioners are third parties to the underlying litigation. Elkayam is a Broadcom
10 employee.

11 This motion is based upon this Notice; the attached Memorandum of Points and
12 Authorities; the Declaration of Dean G. Dunlavey in support of this motion; and on such further
13 evidence and arguments as may be presented in connection with this motion.

14
15 Certification of Compliance with Civil Local Rule 37-1

16 Counsel for Petitioners certifies that they have met and conferred in good faith with
17 PowerDsine counsel but were unable to reach agreement with PowerDsine as to either the proper
18 scope of the Elkayam deposition or a mutually convenient date for the deposition, necessitating
19 this motion.

1	I.	INTRODUCTION	1
2	II.	STATEMENT OF FACTS	4
3	III.	ARGUMENT	9
4	A.	Legal Standard	9
5	B.	An Order Protecting Elkayam is Necessary Because Inadequate Time Was Provided to Respond	10
6	C.	PowerDsine is Seeking Discovery on Confidential Broadcom Information That is Irrelevant to the Issues in PowerDsine's Lawsuit With AMI Semiconductor.....	11
7			
8	D.	PowerDsine's Assertion that the Features in Broadcom's Products are "Highly Confidential" PowerDsine Information is Nonsensical and a Blatant Abuse of the Protective Order Entered in the Lawsuit	12
9			
10	E.	An Order Protecting Elkayam and Broadcom is Necessary Because the Information Sought is Irrelevant and Confidential Such That the Burden to the Non-Parties Outweighs Any Benefit to PowerDsine	13
11			
12			
13	IV.	CONCLUSION	15

CASES

<i>Beinin v. Ctr. For the Study of Popular Culture</i> , Case No. C-06-2298 JW (RS), 2007 U.S. Dist. LEXIS 22518 (N.D. Cal. March 16, 2007)	10
<i>Celerity, Inc. v. Ultra Clean Holdings, Inc.</i> , Case No. C-05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, 2007 WL 205067, (N.D. Cal. Jan. 25, 2007)	3
<i>Donahoo v. Ohio Dept. of Youth Services</i> , 211 F.R.D. 303 (N.D. Ohio 2002)	10
<i>Dart Indus. Co., Inc. v. Westwood Chem. Co., Inc.</i> , 649 F.2d 646 (9th Cir. 1980)	9
<i>Laxalt v. McClatchy</i> , 116 F.R.D. 455 (D. Nev. 1986)	9
<i>Mattel Inc. v. Walking Mountain Productions</i> , 353 F.3d 792 (9th Cir. 2003)	13
<i>Moon v. SCP Pool Corp.</i> , 232 F.R.D. 633 (C.D. Cal. 2005)	14
<i>Skellerup Indus. v. City of Los Angeles</i> , 163 F.R.D. 598 (C.D. Cal. 1995)	9
<i>United States v. CBS, Inc.</i> , 666 F.2d 364 (9th Cir. 1982)	9

RULES

Fed. R. Civ. P. 26(c)(1)	9
Fed. R. Civ. P. 26(c)(1)(G)	14
Fed. R. Civ. P. 45(3)(B)(i)	14
Fed. R. Civ. P. 45(c)(3)	9
Fed. R. Civ. Proc. 45(c)(3)(A)	10

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners Broadcom Corporation (“Broadcom”) and Shimon Elkayam (“Elkayam”) seek the quashing of, or a protective order entered regarding, a deposition and document subpoena to Elkayam transmitted via e-mail by counsel for plaintiffs PowerDsine, Inc. and PowerDsine, Ltd. (“PowerDsine”) to Petitioners’ counsel during the evening of Thursday, August 7, 2008 (“the Subpoena”). The Subpoena, attached as Exhibit X to the Declaration of Dean G. Dunlavey in support of this motion (“Dunlavey Decl.”), purports to command Elkayam’s appearance for deposition at 9:00 a.m. Tuesday, August 12, 2008, just five days (3 business days) later and a date on which PowerDsine knew was unacceptable when it issued the Subpoena. The Subpoena was sent by PowerDsine’s counsel in a case pending in the Southern District of New York, entitled *PowerDsine, Inc. and PowerDsine, Ltd. v. AMI Semiconductor, Inc. and AMI Semiconductor Belgium BVBA*, Case No. 07-CV-6014 (SAS) (FM) (the “Lawsuit”).

In the Lawsuit, PowerDsine is suing AMI Semiconductor on a breach of contract claim. The gist of PowerDsine’s complaint is that when PowerDsine and AMI Semiconductor personnel met in 2004 and 2005, they exchanged confidential information under a non-disclosure agreement (“NDA”) as they explored possible business opportunities. Ultimately they did not enter into an business relationship. PowerDsine alleges that AMI Semiconductor breached its NDA contract by later using PowerDsine information that had been disclosed in 2004-05 under the NDA in Power-over-Ethernet integrated circuits developed with Broadcom. AMI Semiconductor denies these allegations.

Neither Broadcom nor Elkayam is a party to the Lawsuit. Broadcom, whose world headquarters are located in Irvine, California, is a competitor to PowerDsine with respect to certain Power-over-Ethernet products. Elkayam is a Broadcom employee, currently working in San Jose, California. Prior to December 2005, Elkayam was employed by PowerDsine in Israel. There are, however, no claims in PowerDsine’s complaint against either Broadcom or Elkayam,

1 and there are no allegations in PowerDsine's complaint that Elkayam was ever an employee or
2 agent of AMI Semiconductor.

3 Fact discovery in the Lawsuit presently is scheduled to close on August 29, 2008.
4 PowerDsine has had the opportunity to seek discovery from AMI Semiconductor as to AMI
5 Semiconductor's relationship with Broadcom. PowerDsine's counsel has confirmed that AMI
6 Semiconductor produced the communications and correspondence exchanged between AMI
7 Semiconductor and Broadcom. Yet now, in a last minute flurry of activity before that discovery
8 cut-off, PowerDsine has served Broadcom and Elkayam with subpoenas that seek discovery on
9 Broadcom's internal development work on its Power-over-Ethernet products.

10 Petitioners have offered to make Elkayam available to testify about work he did while at
11 PowerDsine, but want assurances that PowerDsine will not use his deposition to inquire into
12 Broadcom's confidential trade secrets. PowerDsine has refused to agree with Petitioners'
13 requests. PowerDsine's counsel have refused to disclose the topics as to which they intend to
14 question Elkayam, stating only that they are not willing to limit the questioning to the pre-
15 December 2005 time period and that there are "certain features" in Broadcom's Power-over-
16 Ethernet products about which they want to question Elkayam. PowerDsine counsel refused to
17 identify those features, claiming that the identification of the features in **Broadcom** products is
18 designated as "highly confidential" **PowerDsine** information under the protective order in the
19 Lawsuit.

20 PowerDsine's position is transparently without merit. First, the features in Broadcom's
21 existing products obviously cannot be "highly confidential" PowerDsine information. Second,
22 Petitioners' counsel have signed acknowledgements to be bound under the protective order in the
23 Lawsuit. Third, since PowerDsine intends to disclose the features when it questions Elkayam
24 about them, PowerDsine clearly is not using the "highly confidential" designation to protect its
25 confidential information but rather in an attempt to surprise Elkayam at his deposition and make
26 it impossible for him to properly prepare.

27 On August 6 and again on August 7, 2008, Petitioners' counsel informed PowerDsine
28 that August 12 was not an acceptable date for Elkayam's deposition. Tellingly, PowerDsine

1 responded by not only issuing the Subpoena to Elkayam but by issuing subpoenas purporting to
 2 command the depositions of Broadcom's Chief Executive Officer and President Scott McGregor
 3 and Broadcom's Senior Vice President for Global Manufacturing Operations Vahid Manian, and
 4 noticed the depositions for dates that it knew Broadcom's lead counsel would be on vacation.
 5 PowerDsine's counsel had not mentioned either Mr. McGregor or Mr. Manian prior to issuing
 6 those subpoenas, much less stated that it desired to take their depositions.¹

7 Petitioners have served their objections to the Subpoena. Exh. CC.²

8 Petitioners request that the Court quash the Subpoena in its entirety. As set forth below,
 9 PowerDsine's issuance of the Subpoena constitutes a significant abuse of the discovery process.
 10 It provides grossly inadequate time for a response, fails to reasonably accommodate the witness
 11 and his counsel, and appears to be part of a broader last minute campaign by PowerDsine to
 12 inquire into the trade secrets or other confidential or proprietary research, development, or
 13 commercial information of Elkayam and his employer Broadcom, which are not relevant to the
 14 Lawsuit.

15 In the event that the Court does not quash the Subpoena in its entirety, Petitioners
 16 alternatively request that the Court issue a protective order that permits the deposition to go
 17 forward at a time and in a manner permitting Petitioners' lead counsel Dean Dunlavey to prepare

18
 19 ¹ This Court has recognized that "deposition notices directed at an official at the highest level or 'apex' of
 20 corporate management . . . [create] a tremendous potential for abuse or harassment." *Celerity, Inc. v.*
 21 *Ultra Clean Holdings, Inc.*, Case No. C-05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295, *8, 2007 WL
 22 205067, *3 (N.D. Cal. Jan. 25, 2007). Even where a subpoena is directed to a corporate officer of one of
 23 the parties, courts have refused to permit such depositions unless the requesting party can show that the
 24 officer has "unique personal knowledge of the facts at issue" of relevant facts and that "the information
 sought in the deposition can[not] be obtained through less intrusive discovery methods." *Id.* (citing
 cases). Here the potential for abuse and harassment is even more pronounced as Broadcom is not a party
 to the Lawsuit. The circumstances and timing of the "apex" deposition notices is highly suggestive that
 PowerDsine issued them at least in part to put pressure on Broadcom and Elkayam to try to force
 Elkayam to appear for the improperly noticed deposition.

25 After receiving the Subpoena and the McGregor and Manian subpoenas, Petitioners' counsel wrote to
 26 PowerDsine's counsel – twice – and requested that "If you have any evidence that either Mr. McGregor
 27 or Mr. Manian has personal knowledge relevant to PowerDsine's claims or defenses against AMI
 Semiconductor, please provide a detailed accounting of that evidence to me immediately." Exhs. Y, AA.
 Neither of PowerDsine's responses to these letters identified any such evidence.

28 ² All exhibits referenced herein are exhibits to the Dunlavey Declaration, which is being filed
 concurrently with the motion.

1 Elkayam for his deposition and defend him during that deposition, in addition to appropriately
 2 limiting the time and scope of the deposition to avoid abuse. Under this alternative request, the
 3 protective order would limit the questioning to the time period when Elkayam was employed by
 4 PowerDsine, prior to December 2005 and not permit questioning about Elkayam's work at
 5 Broadcom.

6 II. STATEMENT OF FACTS

7 PowerDsine sued AMI Semiconductor in district court in the Southern District of New
 8 York. *See* Exh. A. PowerDsine's sole claim against AMI Semiconductor is for breach of
 9 contract.³ In essence, PowerDsine alleges that it entered into agreements with AMI
 10 Semiconductor that required the parties to protect the confidential and proprietary information
 11 exchanged by the parties while they were considering a business relationship. *Id.* ¶¶ 30-32.
 12 These agreements allegedly included a promise by AMI Semiconductor not use PowerDsine
 13 confidential information to compete with PowerDsine in the Power-over-Ethernet ("PoE")
 14 market. *Id.* ¶ 34. PowerDsine alleges that AMI Semiconductor breached these agreements.
 15 *Id.* ¶ 75.

16 Elkayam is not a party to the Lawsuit. He is a former employee of PowerDsine who now
 17 works for Broadcom. Broadcom also is not a party to the Lawsuit.

18 On February 9, 2008, counsel for PowerDsine served a document subpoena on Broadcom
 19 in the Central District of California, giving Broadcom two weeks to respond to eleven broad
 20 categories of document requests, many of which manifestly sought proprietary Broadcom
 21 materials not relevant to the Lawsuit. Exh. D. Broadcom served objections to the document
 22 subpoena on February 19, 2008. Exh. E.

23 Broadcom's counsel spoke with PowerDsine's counsel about Broadcom's objections to
 24 the document requests on February 29, 2008 and informed PowerDsine's counsel that Broadcom
 25 did not intend to produce any documents in response to the subpoena. However, Broadcom was
 26 willing to go through the requests individually to determine whether agreement could be reached
 27

28 ³ A second claim against AMIS for tortious interference has been dismissed. *Dunlavey Decl.*, ¶ 4.

1 as to the appropriate scope of any request. PowerDsine's counsel expressed no interest in doing
2 so. PowerDsine's counsel did nothing more on the issue for five months. Dunlavey Decl.,
3 ¶¶ 11, 12.

4 On July 25, 2008, counsel for PowerDsine sent an email to Petitioners' counsel, attaching
5 a Rule 30(b)(6) deposition subpoena to Broadcom improperly issued in the Northern District of
6 California (Broadcom's world headquarters is located in the Central District of California), with
7 a notice date of August 7, 2008. Dunlavey Decl., ¶¶ 14, 15 & Exh. H. This notice sought
8 testimony concerning 19 broad categories, and explicitly requested testimony as to proprietary
9 and confidential Broadcom information such as "the development of Broadcom's Power-over-
10 Ethernet integrated circuit products, including internal development activities" (Topic #1) and
11 "the design and development of Broadcom products known as the BCM59101 and the
12 BCM59103 Power-over-Ethernet integrated circuit products, including internal development
13 activities" (Topic #2). Exh. H.

14 In that same July 25, 2008 communication, PowerDsine transmitted a deposition
15 subpoena for Elkayam in the Northern District, noticed for August 1, 2008 – seven days later.
16 Dunlavey Decl., ¶ 14 and Exh. G. The next day (a Saturday), PowerDsine sent counsel an email
17 requesting a meet and confer "about the scheduling of Mr. Elkayam's deposition." Dunlavey
18 Decl., ¶ 17 and Exh. J. That meet and confer took place by telephone on Tuesday, July 29.
19 Dunlavey Decl., ¶ 18.

20 During the call, the participants discussed the timing and scope of Elkayam's deposition,
21 and the schedules of counsel. The participants agreed that the deposition would last no more
22 than one day of seven hours, and agreed to take the deposition off calendar and seek a mutually
23 convenient date. Id. ¶19(g). Due to Elkayam's schedule, the scheduling of other depositions in
24 the Lawsuit, and Petitioner counsel's business, wedding and vacation schedules from August 13
25 through the end of August, counsel for PowerDsine and AMI Semiconductor agreed that they
26 would seek permission from District Judge Scheindlin, the judge presiding over the Lawsuit, to
27
28

1 allow the deposition to occur in early September. Neither party expressed any significant
2 concern that Judge Scheindlin would be unwilling to sign such a stipulation. Id. ¶ 19(h).⁴

3 During the call, the participants also discussed the scope of Elkayam's deposition.
4 Petitioners' counsel stated that they wanted to reach agreement as to the scope of the deposition
5 in advance of the deposition in order to avoid having to seek a protective order during the
6 deposition itself. If agreement could not be reached, Petitioners would need to consider whether
7 to file a motion for a protective order in advance of the deposition. Petitioners' counsel
8 requested an agreement that the scope of the deposition be limited to the time period prior to
9 December 2005, when Elkayam was a PowerDsine employee, or that PowerDsine explain the
10 relevance of testimony related to the period after Elkayam left PowerDsine and became
11 employed by Broadcom. Id. ¶ 19(b).

12 PowerDsine counsel, Mr. Hopkins, was vague as to PowerDsine's intentions. He said
13 that PowerDsine wanted to question Elkayam as to whether he had contributed to "certain
14 features" of the integrated circuits that AMI Semiconductor had developed with Broadcom. He
15 said there were "not more than seventeen" such features. When asked what those features were,
16 Mr. Hopkins stated that those features had been designated "highly confidential" under the
17 protective order in the Lawsuit. Id. ¶ 19(d). In response to questions, Mr. Hopkins confirmed
18 that it was PowerDsine's position that features that were in Broadcom's products were "highly
19 confidential" PowerDsine information such that the features could not be disclosed to
20 Broadcom's attorneys. Mr. Hopkins also confirmed that despite the "highly confidential"
21 designation, PowerDsine intended to question Elkayam about the features at his deposition.
22 Id. ¶ 19(e).

23
24
25 ⁴ During the call, Petitioners' lead counsel made a comment to the effect that if Judge Scheindlin did not
26 sign the anticipated stipulation, the only other date in August that might work with his schedule at that
27 time was August 12. The comment, however, was not a commitment to hold that date open indefinitely
28 or an agreement to produce Elkayam for deposition in the event that PowerDsine failed to come to an
agreement as to the proper scope of his deposition. Dunlavey Decl., ¶ 19(i). PowerDsine and AMI
Semiconductor never submitted a proposed stipulation to Judge Scheindlin to allow the deposition to be
taken in September. Id. ¶ 21.

1 Petitioners' counsel stated that PowerDsine's position appeared to be an abuse of the
 2 protective order – since PowerDsine intended to disclose the “highly confidential” features to
 3 Elkayam during his deposition, the refusal to disclose the features to his counsel in advance of
 4 the deposition seemed intended to prevent Elkayam from properly preparing for his deposition
 5 rather than to preserve any “highly confidential” aspects of the features. Petitioners' counsel
 6 also noted that if either Elkayam or Broadcom were a party to the Lawsuit, he would be in a
 7 position to prepare Elkayam on the “not more than seventeen” features prior to the deposition.
 8 Mr. Hopkins said that he was not prepared to reconsider PowerDsine's position during the call.
 9 Petitioners' counsel asked PowerDsine's counsel to reconsider its position after the telephone
 10 call and provide a list of the Broadcom product features as to which PowerDsine wanted to
 11 question Elkayam. Id. ¶¶ 19(e), (f).

12 PowerDsine's counsel did not respond to Petitioners' requests for the list of “highly
 13 confidential” features for over a week. Then, on the evening of August 6, PowerDsine counsel
 14 sent a letter (Exh. T) attaching a copy of the protective order in the Lawsuit. Exh. U. The letter
 15 stated that if Petitioners' counsel would sign copies of the undertaking to the protective order,
 16 “we can discuss the features of the BCM5910X products at issue in the lawsuit.” Exh. T.
 17 Petitioners' counsel signed the undertaking and provided them to PowerDsine's counsel the
 18 following morning. Exh. V. Yet on August 7, PowerDsine counsel stated that PowerDsine
 19 refused to disclose or discuss the features of the Broadcom products that are at issue in the
 20 Lawsuit in advance of the Elkayam deposition. Dunlavy Decl., ¶ 36(b).

21 Petitioners' counsel served objections to the Elkayam subpoena dated July 25, 2008 on
 22 July 31, 2008. Exh. P. On the same day, Petitioners' counsel sent PowerDsine a letter
 23 reiterating concerns about the scope of Elkayam's deposition and confirming again that both
 24 Amos Hartston and Dean Dunlavy would be unavailable from August 13 through September 1,
 25 2008. Exh. O. On August 6, 2008, Petitioners' counsel informed PowerDsine's attorneys that it
 26 was no longer possible for the Elkayam deposition to be scheduled on August 12, even if
 27 agreement could be reached as to the proper scope of the deposition. Exh. S.

28

1 On August 7, 2008, counsel again met and conferred regarding the scheduling of
2 Elkayam's deposition. Dunlavey Decl., ¶ 35. Petitioners' counsel reiterated that it was no
3 longer possible for the deposition to be scheduled on August 12, as the requested information
4 necessary to prepare had not yet been provided by PowerDsine, no agreement had yet been
5 reached regarding the scope of the deposition, and in any event Mr. Dunlavey's schedule had
6 filled up during the interim. Dunlavey Decl., ¶ 36. Petitioners' counsel urged PowerDsine to
7 review and comment on the draft stipulation that AMI Semiconductor had sent to PowerDsine
8 which would allow the deposition to go forward on September 5, 2008. Id. ¶ 36(g). Rather than
9 work towards a mutually agreeable outcome, PowerDsine responded by transmitting a "revised"
10 deposition subpoena for Elkayam within hours of the meet and confer, noticing the deposition
11 for August 12, 2008 – a date that PowerDsine knew was unavailable. Exh. X.

12 As discussed above, when Petitioners' counsel refused to agree to produce Elkayam for
13 deposition on August 12, PowerDsine responded by not only issuing this Subpoena but by
14 issuing subpoenas purporting to command the depositions of Scott McGregor, Broadcom's Chief
15 Executive Officer and President, and Vahid Manian, its Senior Vice President for Global
16 Manufacturing Operations. Dunlavey Decl., ¶¶ 37, 38. PowerDsine noticed the "apex"
17 depositions for August 22, a date that it knew Broadcom's lead counsel would be on vacation in
18 Alaska. PowerDsine's counsel had not mentioned either Mr. McGregor or Mr. Manian prior to
19 issuing those subpoenas, much less stated that it desired to take their depositions. Id.

20 After receiving the McGregor and Manian subpoenas, Petitioners' counsel wrote to
21 PowerDsine's counsel twice and requested "If you have any evidence that either Mr. McGregor
22 or Mr. Manian has personal knowledge relevant to PowerDsine's claims or defenses against AMI
23 Semiconductor, please provide a detailed accounting of that evidence to me immediately."
24 Exhs. Y, AA. Neither of PowerDsine's responses to these letters has identified any such
25 evidence. Exhs. Z, BB.

1 **III. ARGUMENT**

2 **A. Legal Standard**

3 PowerDsine is on a last-minute fishing expedition into non-party Broadcom's
4 confidential information not relevant to the pending Lawsuit, and Petitioners seek an order from
5 this Court quashing the Subpoena in its entirety or, in the alternative, issuing a protective order.
6 Under Federal Rule of Civil Procedure 45(c)(3), a subpoena must be quashed if it "fails to allow
7 reasonable time to comply" and may be quashed if it requires the disclosure of a trade secret or
8 other protected material. Under Federal Rule of Civil Procedure 26(c)(1), "[a] party or any
9 person from whom discovery is sought may move for a protective order in the court where the
10 action is pending – or as an alternative on matters relating to a deposition, in the court for the
11 district where the deposition will be taken."

12 In response to a motion for a protective order, the Court may issue an order including
13 *inter alia* "forbidding the disclosure or discovery," "forbidding inquiry into certain matters, or
14 limiting the scope of disclosure or discovery to certain matters," and "requiring that a trade secret
15 or other confidential research, development, or commercial information not be revealed or be
16 revealed only in a specified way." *Id.* This list is merely illustrative; a court has wide discretion
17 to fashion relief. *United States v. CBS, Inc.*, 666 F.2d 364, 368-69 (9th Cir. 1982).

18 A party or person seeking a protective order must show good cause. *Skellerup Indus. v.*
19 *City of Los Angeles*, 163 F.R.D. 598, 600 (C.D. Cal. 1995). However, protective orders are
20 generally more easily obtained when discovery is sought from third parties. *Dart Indus. Co., Inc.*
21 *v. Westwood Chem. Co., Inc.*, 649 F.2d 646, 649 (9th Cir. 1980); *see also Laxalt v. McClatchy*,
22 116 F.R.D. 455, 457-458 (D. Nev. 1986) (stating the "[t]he rule is thus well established that
23 nonparties to litigation enjoy greater protection from discovery than normal parties" and thus
24 discovery requests "require a stronger showing of relevance than for simple party discovery").
25 "A court keeps this distinction between a party and nonparty in mind when it determines the
26 propriety of a nonparty's refusal to comply with a subpoena by balancing 'the relevance of the
27 discovery sought, the requesting party's need, and the potential hardship to the party subject to
28

the subpoena.” *Beinin v. Ctr. For the Study of Popular Culture*, Case No. C-06-2298 JW (RS), 2007 U.S. Dist. LEXIS 22518, *6 (N.D. Cal. March 16, 2007).

Rule 45(c)(1) provides that:

A party or attorney responsible for issuing and serving a subpoena *must* take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court *must enforce this duty and impose an appropriate sanction* – which may include lost earnings and reasonable attorney’s fees – on a party or attorney who fails to comply.

Emphasis added.

B. An Order Protecting Elkayam is Necessary Because Inadequate Time Was Provided to Respond

An order protecting Elkayam from deposition is necessary first because counsel for PowerDsine did not provide sufficient time to respond, and noticed the deposition for a date they knew was unavailable. The federal rules explicitly require that a subpoena allow for a reasonable time for compliance. Fed. R. Civ. Proc. 45(c)(3)(A) (“the issuing court *must* quash or modify a subpoena that...fails to allow a reasonable time to comply”) (emphasis added); *see also Donahoo v. Ohio Dept. of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) (disapproving deposition subpoenas issued one week before the noticed date). Here, Elkayam’s deposition was noticed for August 12, which would be the third business day after PowerDsine e-mailed its deposition subpoena, and a date that PowerDsine repeatedly had been told would not work. *See supra*.

The discovery schedule in the Lawsuit provides no excuse for PowerDsine. Elkayam is not a party to the Lawsuit. PowerDsine waited until the fact discovery deadline was almost upon it before issuing the Subpoena, and then refused to meet and confer in good faith in order to address issues regarding the timing and scope of the deposition. PowerDsine and AMI Semiconductor did not submit the stipulation to Judge Scheindlin in the Southern District of New York that they agreed they would – a stipulation that would have allowed Elkayam’s deposition to go forward in September, when both he and counsel were available. While PowerDsine blames AMI Semiconductor for not reaching a stipulation earlier (see Exh. BB), that has no bearing on Petitioners. Moreover, PowerDsine has no explanation for why AMI

1 Semiconductor's initial and subsequent proposed stipulations were not acceptable nor does it
 2 explain why, if it found the proposed stipulation language unacceptable it did not go to Judge
 3 Scheindlin directly. Instead, PowerDsine issued the Subpoena on just a few dates notice for a
 4 date it knew was unavailable, refused to provide information necessary to prepare for the
 5 deposition, and refused to limit the scope of the deposition to matters relevant to the Lawsuit.
 6 The Subpoena should be quashed on these bases alone.

7 **C. PowerDsine is Seeking Discovery on Confidential Broadcom Information**
 8 **That is Irrelevant to the Issues in PowerDsine's Lawsuit With**
 9 **AMI Semiconductor**

10 The Court should quash the Subpoena because PowerDsine is attempting to use it as a
 11 fishing expedition to seek discovery into Broadcom's confidential information that has nothing
 12 to do with any of the issues in PowerDsine's Lawsuit with AMI Semiconductor.

13 As discussed above, PowerDsine and Broadcom sell competing Power-over-Ethernet
 14 integrated circuits. Elkayam has worked at Broadcom from about December 2005 until the
 15 present. For about one year of his time at Broadcom (from the Summer of 2006 until the
 16 Summer of 2007), Elkayam worked in Broadcom's Power-over-Ethernet group. While Elkayam
 17 principally worked on testing Broadcom's products, he has had access to confidential Broadcom
 18 materials describing their internal design. Such topics cannot possibly be relevant to
 19 PowerDsine's lawsuit against AMI Semiconductor. PowerDsine is suing AMI Semiconductor
 20 for breach of contract, alleging that AMI Semiconductor violated an NDA with PowerDsine.

21 Elkayam has offered to be deposed, provided that the deposition be limited to his pre-
 22 December 2005 work at PowerDsine, and not cover his subsequent work at Broadcom.
 23 PowerDsine's counsel refused to accept this limitation. To the contrary, in meet and confers,
 24 PowerDsine's counsel have indicated that they are interested in deposing Elkayam regarding his
 25 knowledge of the internal design of Broadcom's products. Because PowerDsine is attempting to
 26 use its Subpoena for improper purposes, the Subpoena should be quashed.

27 Anticipating PowerDsine's argument in response that Elkayam's deposition transcript
 28 could be marked "HIGHLY CONFIDENTIAL" under the protective order in the Lawsuit and
 Broadcom's concerns could be met by that designation, such an argument would be without

1 merit. Broadcom – a non-party – should not be required to disclose its confidential design and
 2 testing information to a competitor when the information is not relevant to PowerDsine’s claim
 3 that AMI Semiconductor breached an NDA. Moreover, the protective order in the Lawsuit
 4 specifically contemplates that parties will be able to redact their documents so as to avoid
 5 disclosing irrelevant information, even though the documents can be marked “HIGHLY
 6 CONFIDENTIAL.” See Exh. U, at 16 (“Where the producing party, in good faith, believes that
 7 information . . . contained in a document is confidential and not relevant to the issues of this
 8 action . . . such information may be redacted . . .”). Thus, PowerDsine itself has recognized that
 9 marking materials as “HIGHLY CONFIDENTIAL” is no panacea that permits discovery into
 10 confidential, irrelevant information.

11 **D. PowerDsine’s Assertion that the Features in Broadcom’s Products are**
 12 **“Highly Confidential” PowerDsine Information is Nonsensical and a Blatant**
Abuse of the Protective Order Entered in the Lawsuit

13 An order quashing the Subpoena or entry of a protective order is further necessary
 14 because PowerDsine is abusing the protective order in the Lawsuit for tactical purposes,
 15 intentionally and improperly withholding information that – if PowerDsine is allowed to depose
 16 Elkayam and further is allowed to question him concerning the features of Broadcom’s products
 17 – would be necessary to adequately prepare him for his deposition. As described above,
 18 PowerDsine’s attorneys have designated features in Broadcom’s products as PowerDsine’s
 19 “highly confidential” information and on that basis refused to disclose the features to Petitioners
 20 in advance of Elkayam’s deposition. This is improper.

21 Under the protective order in the Lawsuit, “HIGHLY CONFIDENTIAL – OUTSIDE
 22 ATTORNEYS EYES ONLY INFORMATION” PowerDsine information is “sensitive
 23 commercial information or other confidential information that [PowerDsine] does not wish to
 24 disclose publicly” that PowerDsine “reasonably and in good faith [deems] . . . to include
 25 confidential technical information, such as [PowerDsine’s] research, design or development
 26 information, or highly sensitive business information, or trade secrets.” Exh. U, at 2. Given this
 27 definition, it is nonsensical for PowerDsine to claim that features in Broadcom’s products are

1 PowerDsine's "highly confidential" information that legitimately can be withheld from
2 Broadcom.

3 Furthermore, Petitioners' counsel signed acknowledgements to be bound under the
4 protective order. Exh. V. Since counsel for PowerDsine has contended that such
5 acknowledgements are sufficient to address confidentiality concerns, there would be no basis for
6 PowerDsine's refusal to provide the information even if it were "highly confidential"
7 PowerDsine information.

8 In addition, PowerDsine has yet to provide an acceptable response as to how Broadcom's
9 development of the features in its integrated circuits is relevant to PowerDsine's breach of
10 contract claim against AMI Semiconductor.

11 Finally, the acknowledgment by PowerDsine's attorneys that they intend to disclose the
12 "highly confidential" information at Elkayam's deposition demonstrates that PowerDsine is not
13 withholding the information in order to protect its "highly sensitive business information or trade
14 secrets" but rather to prevent Petitioners' counsel from adequately preparing Elkayam for his
15 deposition and attempt to surprise and ambush Elkayam.

16 PowerDsine's discovery misconduct, blatant abuse of the protective order, and failure to
17 provide a credible justification for how the material sought is relevant to the Lawsuit,
18 demonstrate that it is conducting a harassing and vexatious campaign against Elkayam and
19 Broadcom generally. Accordingly, the subpoena should be quashed in its entirety. *See Mattel*
20 *Inc. v. Walking Mountain Productions*, 353 F.3d 792, 814 (9th Cir. 2003) (upholding quash of
21 subpoena "served for the purpose of annoying and harassment").

22 **E. An Order Protecting Elkayam and Broadcom is Necessary Because the**
23 **Information Sought is Irrelevant and Confidential Such That the Burden to**
24 **the Non-Parties Outweighs Any Benefit to PowerDsine**

25 In the event the subpoena is not quashed, a protective order is necessary. Under the
26 circumstances, the burden that the Subpoena places on non-parties Elkayam and Broadcom
27 clearly outweighs any benefit to PowerDsine. Despite Petitioners' requests that it do so,
28 PowerDsine has failed to demonstrate how Broadcom's internal development of its products
relates in any way to PowerDsine's breach of contract claim against AMI Semiconductor. *See*

1 *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (granting motion to quash non-
 2 party subpoena as irrelevant and overbroad and noting “[a]lthough irrelevance is not among the
 3 litany of enumerated reasons for quashing a subpoena found in Rule 45, courts have incorporated
 4 relevance as a factor when determining motions to quash”). Moreover, the information sought
 5 by PowerDsine constitutes highly sensitive proprietary and/or technical information of non-
 6 parties Elkayam and Broadcom.

7 It is well-established that a court can quash or modify a subpoena that requires
 8 “disclosing a trade secret or other confidential research, development, or commercial
 9 information.” Fed. R. Civ. Proc. 45(3)(B)(i). This is also a grounds for a protective order under
 10 Rule 26(c)(1)(G). This is particularly appropriate where the relevance of the information has not
 11 been established, and the confidential information is of a non-party to the lawsuit.

12 Accordingly, in the event the deposition is to go forward, the following protective order
 13 is requested:

- 14 1. Setting the deposition for a date that will allow appropriate notice and
- 15 preparation;
- 16 2. Limiting the deposition to one day of seven hours.
- 17 3. Limiting the scope of questioning to the time period when Elkayam was
- 18 employed by PowerDsine, prior to December 2005.

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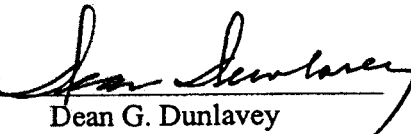
28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, the motion should be granted, an immediate stay of the
3 deposition entered, as well an order quashing the subpoena or issuing a protective order
4 regarding the deposition of Shimon Elkayam or, in the alternative, limiting the scope of the
5 deposition as described above.

6
7 **DATED:** August 11, 2008

LATHAM & WATKINS LLP
Dean G. Dunlavey
Amos E. Hartston

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9
10
11 By: 
12 Dean G. Dunlavey

13 Attorneys for Petitioners
Broadcom Corporation and
Shimon Elkayam

14 SV628537.6

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 140 Scott Drive, Menlo Park, CA 94025.

On August 11, 2008, I served the following documents described as:

1) Petitioner Third Parties Broadcom Corporation and Shimon Elkayam's Notice of Motion and Motion to Quash or for a Protective Order Regarding Deposition and Document Subpoena to Shimon Elkayam in *PowerDsine, Inc. and PowerDsine, Ltd. v. AMI Semiconductor, Inc. and AMI Semiconductor Belgium BVBA*, Case No. 07-CV-6014 (SAS) (FM), Southern District of New York.

2) Declaration of Dean G. Dunlavey in Support of Petitioner Third Parties Broadcom Corporation and Simon Elkayam's Motion to Quash or for a Protective Order Regarding Deposition and Document Subpoena to Shimon Elkayam

3) [Proposed] Order Granting Petitioner Third Parties Broadcom Corporation and Shimon Elkayam's Motion to Quash or for a Protective Order Regarding Deposition And Document Subpoena to Shimon Elkayam

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL

The above-described document was transmitted via electronic mail to the following parties on August 11, 2008:

Kimberly Giuliano Email: KGiuliano@chadbourn.com	Peter Bucci Email: PBucci@chadbourn.com
Walter Hanchuk Email: WHanchuk@chadbourn.com	Scott Balber Email: SBalber@chadbourn.com
Dennis Hopkins Email: DHopkins@chadbourn.com	Paul Tanck Email: PTanck@chadbourn.com
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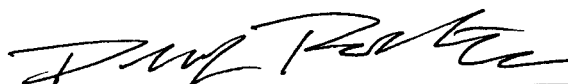
AND BY U.S. MAIL

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

Kimberly Giuliano, Esq. Walter Hanchuk, Esq. Dennis Hopkins, Esq. Peter Bucci, Esq. Scott Balber, Esq. Paul Tanck, Esq. Chadbourne & Park LLP 30 Rockefeller Plaza New York, NY 10112	H. Rowan Gaither IV, Esq. Richards Kibbe & Orbe LLP One World Trade Center New York, NY 10281
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 11, 2008** at Menlo Park, California.



Deborah Peterson